Internal Revenue Service memorandum

SWIanacone

date:

JUN 28 1988

to: Joseph B. Boucree, Case Manager Fred Schmitt, Revenue Agent

from: Director, Tax Litigation Division CC:TL

subject: Application of I.R.C. § 162(g) to the Deduction of Treble Damage Payments by

This is in response to your request for formal technical advice involving the above-captioned matter. We have discussed this issue extensively with both Joseph Boucree and Fred Schmitt of your office on a number of occasions.

ISSUE

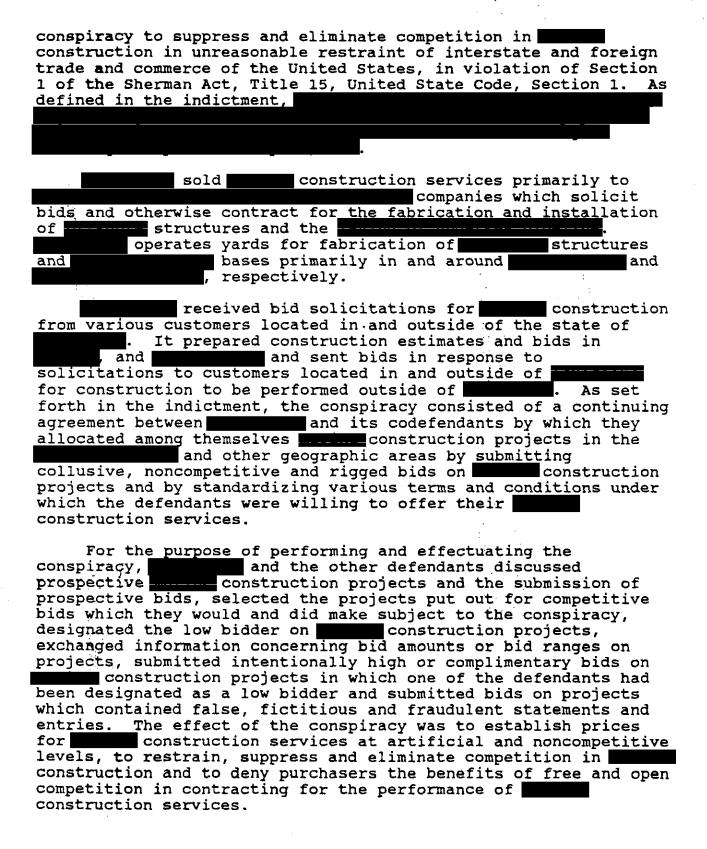
whether is entitled to deduct two-thirds of the treble damages paid in settlement of civil suits, which resulted from a plea of nolo contendere to a criminal indictment alleging that and other defendants conspired to rig bids in the construction industry for the period through through involving projects that were not specifically named in the original bill of particulars accompanying the indictment.

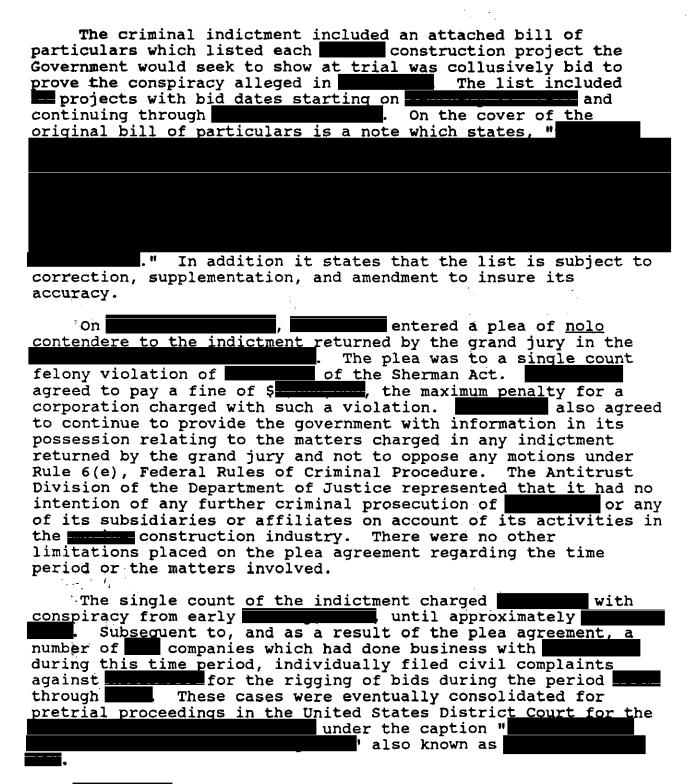
CONCLUSION

For the reasons discussed below, we believe that I.R.C. § 162(g) applies to all projects encompassed by the civil complaint and not just those listed in the orginal bill of particulars accompanying the criminal indictment.

DISCUSSION

on	the grand	jury sitti:	ng in the Unit	ed
District Court for the			returned	an
indictment ad	ga <u>inst</u>			
and other defendants	•	the ind	ictment allege	ed a
conspiracy in restraint of	f trade and	commerce.	The indictmen	ıt
stated that beginning at 1	least as ea:	rly as	and	1
continuing thereafter unt:			the	
defendant and co-conspirat	tors engage	d in a comb	ination and	





eventually settled these cases by means of a formula agreed upon by the parties prior to the actual litigation of the civil claims. The general agreement called for to pay a specific percentage on projects that were listed in the

original bill of particulars filed with the indictment plus a separate percentage for the other projects involved in the civil complaints. Even though different amounts were paid for the various projects, the time periods specified in the indictment and the civil complaints overlapped one another and included all the projects in question.

your office informed us that on its income tax returns, sought to deduct two-thirds of the civil settlement payments for all bids other than those specifically listed in the original bill of particulars accompanying the indictment. It is their position that I.R.C. § 162(g) only applies to the settlement payments which were made for those projects specifically listed in the orginial bill of particulars. However, § 162(g) and the accompanying regulations apply to the settlement of any action brought under Section 4 of the Clayton Act which involves the same violation for which the taxpayer was indicted.

has sought to distinguish the projects listed in the original bill of particulars accompanying the criminal indictment from the additional projects listed in the civil complaints which were bid prior to the same continuing conspiracy for which was indicted. In order to prove the charge of conspiracy, it is necessary to show the activities which were part of the conspiracy and that they occurred within five years of the indictment. The government's listing of specific projects in the bill of particulars was intended merely to show that these projects were collusively bid and were part of the affirmative actions which made up the conspiracy.

It must be remembered that was charged and pleaded nolo to one count of conspiracy. Neither the indictment nor the plea agreement entered into by limited the criminal activities solely to the projects listed in the original bill of particulars. While the Antitrust Division of the Department of Justice limited the original bill of particulars to projects with bid dates beginning on or after that a supplementary list providing the identity of projects bid prior to which the government might offer at trial as evidence against the defendants would be submitted to the defendants in the near future. It seems obvious that the Antitrust Division intended to include projects bid prior the

^{1/} The reason for this initial limitation might be that the evidence was fresher and, therefore, stronger for the later bids or they might have been concerned with the statute of limitations running before they could present evidence on all the rigged bids which occurred during the period of the conspiracy.

as additional acts supporting the conspiracy charge in the indictment.

It is important to remember that what is involved in this case is a civil settlement based on the same violation for which was indicted. These are not related violations and, therefore, Treas. Reg. § 1.162-22 and Fisher Companies, Inc. v. Commissioner, 84 T.C. 1319 (1985) aff'd without opinion, 1987 CCH Vol. 10, p. 70,707 (9th Cir. 1986), are not controlling. Although there was no accompanying civil injunction obtained by the government, cannot limit the extent of the civil settlement as the taxpayer did in Fisher because these are the same violations and not related violations as determined by the court in Fisher. Moreover, the civil and criminal periods are essentially the same. 2/

Based upon the documents which you have supplied, it is our position that was indicted for conspiracy to rig bids from the period through and that its civil settlement of the "involves the same violation. We, therefore, recommend that the deductions for the settlement payments made for projects bid prior to on the Federal Income Tax Return of be denied.

If we can be of further assistance please contact Steven W. Ianacone at FTS 566-3407.

MARLENE GROSS

By:

DANIEL J. WILES
Chief, Branch No. 3
Tax Litigation Division

^{2/} The court in <u>Fisher</u> was incorrect in its determination that the five-year statute of limitations applied to the taxpayer. The five-year statute merely requires that some act in furtherance of the conspiracy be committed within five years of the indictment.